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**In the Supreme Court
of the State of Utah**

HAWAIIAN EQUIPMENT COMPANY,
LIMITED, a corporation,

Plaintiff and Respondent,

vs.

THE EIMCO CORPORATION, a
corporation,

Defendant and Appellant.

Case No.
7188

REPLY BRIEF OF APPELLANT

FILED

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By their brief, counsel for respondent, in effect, concede the insufficiency of the cablegrams (Exhibits A and B) standing alone to constitute a written contract, but they argue that the deficiencies are supplied by the oral conversations between the parties prior to the sending of said cablegrams. In other words, they contend that notwithstanding Exhibit A, “*the memorandum in writing of the contract*” signed “*by the party to be charged*”

merely says: "Reference hammers," respondent had the right to show by parol what hammers and of what makes and how many of each make EIMCO meant, that is, that it meant:

"Scaling Hammers

418 Model K-1 Ingersoll-Rand Co.
 1250 Model FC Chicago Pneumatic Tool Co.
 140 Model MM Independent Pneumatic Tool Co.
 4 Model "Super" Keller Co.
 1 Model A Dallet Co.

1813 Total

Chipping Hammers

708 Model No. 2 Master Pneumatic Tool Co.
 188 Model No. 2 Chicago Pneumatic Tool Co.
 92 Model No. 200 Ingersoll Rand Co.
 22 Model No. 2 Keller Co.

1004 Total"

The foregoing is a particular description of the property respondent alleges in its complaint that appellant by Exhibit A agreed to buy. If counsel's contention is correct, then the lack of description in the "memorandum" is immaterial and the authorities which hold that the "memorandum" must contain all the terms of the contract, including a designation and description of the property which is the subject of the transaction, are to be disregarded.

The cases cited by counsel do not sustain their contention that such deficiencies in the "memorandum" may be supplied by parol. They merely hold that in some

circumstances, parol evidence is admissible to apply a *definite* description in a memorandum to particular property. Let us examine the authorities counsel cite at pages 15-16 of their brief.

In *Bartlett-Heard and Cattle Company v. Harris*, 238 Pac. 327, the offer to sell described the property as "all the heifers you inspected." This language definitely specified the property. Parol evidence did not add to the contract, but only applied the designation to the particular property which had theretofore been identified.

In *Northeastern Paper Company v. Concord Paper Co.*, 212 N.Y.S. 218, the description was "all paper rolls stored in seller's warehouse." Here the property is definitely described. The description could necessarily mean only certain specific property.

In *Zimmerman Bros. and Company vs. First National Bank*, 263 N. W. 361, the description was "Park Ridge Safety Deposit Boxes." This could mean only certain specified boxes. It limits and restricts the designation to particular property.

The principal announced in these cases is thus stated in 27 C.J. 383:

"Parol evidence is admissible for the purpose of applying the description in the memorandum and thus identifying the subject matter of the contract provided such subject matter is so described in the memorandum as to be capable of certain identification; but parol evidence is not admissible to *supply* a description of the subject matter." (Italics ours)

This court has itself applied that rule. In *Easton v.*

Thatcher, 7 Utah 99, the memorandum was as follows:

“Received of J. M. Easton the sum of \$10.00 as an option on one-half interest of Hyrum Thatcher of Logan City in horses and ranch etc.”

Says the court:

“This is equivalent to saying ‘a ranch in which Hyrum Thatcher owns a one-half interest.’ Extrinsic evidence to show that Hyrum Thatcher owned a one-half interest in a ranch would be competent, and it would also be competent for witnesses familiar with the ranch to describe it, giving its boundaries. By such evidence the contract could be applied to the subject matter, and if the existence of such a ranch was to be so shown, in the absence of any proof of another ranch in which Hyrum Thatcher owned a one-half interest, the subject matter of the contract would be identified and it would not be within the statute of frauds. It would also be competent to prove that Hyrum Thatcher owned a one-half interest in no other ranch.”

This court approved the foregoing rule in *Cummings v. Nielson*, 42 Utah 157, 168, 129 Pac. 619, and in *Johnson v. Jones*, 109 Utah 92, 164 Pac. 893.

But the case at bar is certainly not within that rule. What is there in the words “Reference hammers bid maximum 24 dollars each, scalers 17.50 each Honolulu. Will take all,” so that oral testimony could apply this language to any certain property and especially to the particular list of property set forth in the complaint? Exhibit A does not describe any particular property, either by models, makes, quantity or location, so as to make it capable of certain identification as none other

than the particular property listed in the complaint and as the property appellant understood to be the subject matter of the contract. If all these omissions can be supplied by parol, then the rule that the memorandum signed by the party to be charged shall contain all the terms of the agreement and a reasonably definite description of the property means nothing. Furthermore, the evidence shows that Blades, whom respondent regarded as the man who knew most about the merchandise, says that he saw only samples of the property and did not know how many of any different make tools were contained in the crates until they had been moved to and opened at the Salt Lake area in Honolulu in the latter part of August. (Rec. pp. 206-207). How can it be said that the words "Reference hammers" meant the particular property listed in the complaint when the respondent itself did not know of what the property consisted until long after the exchange of cablegrams? There was no possibility that the words "Reference hammers" could mean *that particular property*. The fact that Exhibit A contains the words "Will take all" does not help to identify the property. All of what? All the government had for sale? All respondent decided to buy from the government? All that respondent should decide to deliver to appellant? The words have no definite meaning as applied to any particular property. Under the universally accepted rule, the "memorandum" must be definite in its terms and conditions and the property must be so described that it cannot be one thing or another. Descriptions such as "the forty acre

tract of John Davis'' might be shown to be a forty in Section 36, but if the evidence showed that he owned more than one forty, the memorandum would have to be rejected. The property might be described as ''all the sacks of sugar in the warehouse of ''B'' or ''all the flour inspected by you'' or by any other phraseology that would necessarily limit the identification so that only certain property could possibly be covered by the writing. In any such case, parol is permissible to apply the words to such particular property, but ''Reference hammers'' does not identify any particular group, kind, model, or make of hammers, or where located, or the quantity thereof. Certainly those words do not identify the *particular numbers, models, makes or kinds of hammers respondent alleges in its complaint that appellant agreed ''in writing'' to buy.*

As stated in our quotation from Corpus Juris, parol evidence is not permissible to supply a description. The true rule is well stated by the Supreme Court of Michigan in *Eggleston v. Wagner*, 46 Mich. 610, 618:

'' ''A further objection is that the proposal did not sufficiently describe the real estate to satisfy the Statute of Frauds. The general principle is not questioned. The degree of certainty with which the premises must be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are not all harmonious. But they agree in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the

subject matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property'."

We invite the court at this point to again refer to the cases cited on pages 11 to 20 of our first brief as to what must be embodied in the "memorandum". Here, *according to the complaint* the goods were sold by specific description, so many of each make and model, so this is particularly a case where the specific description of the property or some language definitely designating it by location or other means of identification, should have appeared in the "memorandum."

At page 7 of our brief, we cited the case of *National Bank of Commerce v. Lambourne, et al*, 2 Fed. (2d) 23, in support of the recognized principle that in construing commercial contracts, every word must be given effect, and that, therefore, the words, "bid maximum", in Exhibit A are not to be disregarded or interpreted as an "offer to buy", when such an interpretation is different from what those words imply. Counsel for appellant (Br. p. 9) assert that in the reversal of this case by the Supreme Court of the United States, the principle for which we contend was repudiated. Such is not the case. The majority opinion merely distinguishes the Lambourne case from *Filley v. Pope*, 115 U.S. 213, 29 L. Ed. 372, wherein the court clearly recognizes the principle

to be applied in the construction of commercial contracts. Indeed, in the majority opinion in the Lambourne case, it is said:

“As was said in *Harrison v. Fortlage*, 116 U. S. 57, 63, 16 S. Ct. 488, 489, 40 L. Ed. 616:

“‘The court is not at liberty either to disregard words used by the parties descriptive of the subject matter or of any material incident or to insert words which the parties have not made use of’.”

Moreover, Chief Justice Stone in a dissenting opinion in the Lambourne case says that all of the members of the Supreme Court were in agreement upon the principal to which we refer. Chief Justice Stone says at the end of his dissent, concurred in by three other justices:

“The provision in the letter of credit that conditions embodied in this credit must be adhered to, otherwise payment will not be effected, only expresses the rule *with which we all agree* that liability upon a mercantile contract may be established only by strict compliance with its conditions.” (Citing *Filley v. Pope* and other cases).

In answer to appellant's contention that there was no meeting of minds, and therefore no contract, because appellant by Exhibit A meant one thing, that is, an authorization to bid, while respondent claims it regarded said exhibit as an offer to buy, counsel for respondent urge that when Exhibits A and B are considered “in the light of the circumstances under which they were made,” (App. Br. p. 25) and “in the light of their (the parties') knowledge and the attendant circumstances,” (App. Br. 31) a meeting of minds is disclosed, and coun-

sel quote excerpts from the testimony of MacNaughton as to what were the "attendant circumstances."

Again at page 7 of its brief, respondent states:

"The *undisputed evidence* showing the situation of the parties and surrounding circumstances taken together with the exchange of cables (Ex. A. & B.) establish that Eimco agreed to purchase from Hawaiian Equipment Company the entire quantity of certain pneumatic tools, etc." (Italics ours).

The record will disclose that Mr. Rosenblatt controverts the statements of MacNaughton as to the "surrounding circumstances" and as to what was said in the telephone conversations and the evidence is not undisputed that "Eimco agreed to purchase" etc. Rosenblatt testified positively that he made no proposal to buy and that respondent did not offer appellant anything. (Rec. p. 242). The "surrounding circumstances" as stated by MacNaughton is only his version, which is no more worthy of acceptance than Mr. Rosenblatt's. Furthermore, respondent insisted at the trial that the two cables constituted the contract that "cannot be modified by previous parol conversations," (Rec. pp. 236, 254, 259) and that any testimony with respect to the relations between Rosenblatt and Wineberg for the purpose of showing an agency and that, therefore, Exhibit A was merely an authorization to bid was not admissible. (Rec. p. 254). This objection was by the court sustained. Now, however, in order to make it appear that a contract was entered into, counsel want this court to accept oral state-

ments made prior to the cablegrams (that is, respondent's version of those conversations) to supplement the cables as to description of property and terms of the contract and to interpret the words "bid maximum" as meaning "offer to buy."

At page 8 of their brief, counsel assert:

"The minutest search of the record will fail to reveal that there was any serious effort to present, during the trial of this cause, any such issue to the effect that while defendant denies it made a contract to purchase from plaintiff, still it admits making a contract appointing plaintiff its agent to acquire these goods from the government."

It is to be regretted that counsel will make such a misstatement. The fact is, as disclosed by the record, that appellant made several offers to prove by Rosenberg^{last} and by Wineberg that appellant intended by Exhibit A to appoint respondent agent to make a bid to the government of the maximum figures stated in Exhibit A (Rec. pp. 236, 253, 254, 259, 274).

Again counsel at the same page of the brief states:

"Eimco had made a proposal through defendant's San Francisco office to buy from plaintiff."

This statement is likewise disputed by Rosenberg^{last} (Rec. p. 242), and even if the statement were true, it could not aid respondent when the validity of the written contract, which it alleges in its complaint, depends upon the contents of the two cablegrams, which during the trial, counsel for respondent repeatedly contended

could not be modified, supplemented or changed by parol.

Now, as to Exhibit B. Respondent has a difficult time indeed trying to establish that Exhibit B was an unconditional acceptance. How can it be said that in an absolute sale to appellant (if there was a sale, which we deny) it was *implied* that appellant by Exhibit A offered to buy only on condition that respondent could secure delivery from surplus? There is no suggestion in Exhibit A that the offer (if there was an offer to buy, which we deny) was conditional upon the delivery of merchandise to respondent. Respondent accepted the offer (if it was an offer) upon that condition because it wanted to play safe. When it now realizes the legal effect of the wording of Exhibit B, it says that appellant was bound if respondent did secure delivery, but respondent would not have been bound if it had not. The language, "in accordance with your cable, Hawaiian Equipment Company *sells* you *subject to delivery from surplus*", is so obviously outside of any suggestion in the "offer" (Exhibit A) that it could not possibly give rise to a contract.

Respondent may have intended that it should be bound only if it could obtain delivery from surplus, and it clearly expressed that state of mind and intention in "Exhibit B"; but appellant gave no indication in Exhibit A that it was doing business on that basis and respondent cannot base its right to recovery on a so-called implied term of the contract to which appellant never assented, which is not alleged in the complaint and which never entered counsel's mind until they came to

appreciate respondent's predicament under a conditional acceptance. After Exhibit A was received and before respondent dispatched Exhibit B, it had already received the assurance of the government of the sale to it of the tools held in surplus. MacNaughton, president of respondent company testified:

Q. Now, Mr. MacNaughton, upon the receipt of the cablegram from Eimco Corporation, which you have testified you received on or about August 8, 1946, you replied by cable. I believe that is the following day, August 9th?

A. Yes.

Q. If I remember correctly. Now at the time, Mr. MacNaughton, you sent that cable which says, 'Hawaiian Equipment Company sells you', and so forth?

A. Yes.

Q. Did you own the tools in question here?

A. Yes.

Q. You had acquired title to them?

A. As soon as we made the—or received the cable from Eimco Corporation saying, setting the price, and saying "Will take all, Honolulu," we called the Surplus Property Office, the man who was in charge of the division of these tools, and told him we were buying those tools from him at the price set by the Government. He said, "All right, they are yours." (Rec. p. 107).

And yet counsel argue that it can be implied from appellant's so-called offer that the contract was to be

conditional on respondent's ability to secure the property from surplus.

At page 19 of the brief, counsel make the interesting statement that the words "subject to delivery from surplus" are immaterial to prevent a binding contract because "Eimco immediately acquired the goods upon receipt of the offer." If respondent knew that to be true, and Eimco had already acquired the goods, why qualify an absolute sale (if there was a sale) by saying it would only be a sale if respondent secured delivery from surplus?

We again refer to the authorities quoted by us in our first brief upon the question of conditional acceptance. If they do not apply to this case, then there is no state of facts to which such rule could apply.

Counsel are so hard pressed on this matter of conditional acceptance that they must even rely upon a remark of counsel for appellant at the trial when moving for a directed verdict. They quote and italicize:

"Conceding that said two cables constituted an offer and acceptance to buy and sell, they did not result in a valid contract because there was no meeting of minds." (Respondent's Brief, p. 25).

Of course, this was only a concession for the sake of the alternative ground of the motion. It is idle to regard it as an admission that there was an offer and acceptance.

Counsel complain that the points argued by appellant that Exhibit B was a *conditional acceptance* and

that "f.o.b." in Exhibit C imports a new term not responsive to Exhibit A, are raised for the first time on appeal (Brief p. 18-21). They also remark that appellant "has brought forth some new ideas on appeal such as the assertion that the acceptance was conditional because it imported an entirely new term in the bargain contrary to what was intended by defendant." (Brief p. 23).

If appellant was late in discovering these defects in the so-called acceptance, we may assume that respondent was equally at fault; otherwise, with their usual candor, they would long ago have confessed that no case could be successfully maintained on such a state of facts. However, we give them credit for saying all that can be said in justification of a verdict, in support of which nothing can be said. They argue that "f.o.b." in Exhibit B is not a new term; that the term is well understood in trade and "meant that plaintiff would deliver the goods sold at Honolulu on board a vessel without charge to Eimco." (Br. p. 21). But is anything said in Exhibit A about "f.o.b."? Who was to designate the vessel? Had respondent the right to deliver the goods on any vessel of its own selection? Can the additional "f.o.b." provision also be *implied* when appellant by Exhibit A says nothing more than "Honolulu"? May we not presume that appellant desired to determine for itself by what line, when, upon what terms and under what insurance the merchandise would be shipped to the mainland? How can it be said that "f.o.b." does not import a new term into the contract, just as "subject delivery

from surplus'' is a new term?

Taking the exhibits, A and B, upon which respondent must rely as the "contract in writing" whereby appellant offered to buy and respondent sold *the particular property itemized in the complaint*, no other conclusion is possible but that Exhibit A is so uncertain and incomplete as to be worthless as a "memorandum" under the statute, but if by any sort of reasoning, however unsound, it can be regarded as an "offer", nevertheless Exhibit B constituted no acceptance and, therefore, no contract ever was created.

In conclusion, counsel requests the court to apply the

"Fundamental judicial principle that where the evidence considered as a whole manifests an intention of the parties to arrive at a bargain, a construction will be given to the transaction, *if possible*, which will establish a valid contract rather than defeat one." (Br. p. 32) (Italics ours).

Of course, there was some intention of the parties to do some kind of business with each other, else Exhibits A and B would never have been sent. Appellant contends that it intended Exhibit A as an authorization for respondent to bid. Respondent says that Exhibit A meant "offer to buy." Respondent asks for the adoption of its construction based on parol evidence which is controverted by appellant. Can such an uncertainty in the writing be cured by parol? Appellant further contends that Exhibit A designates no property then identified or known to either party, or capable of being definitely ascertained, and the proof shows

that even respondent did not consider the property definitely ascertained until weeks after Exhibit A was received, that is to say, after the property had been unpacked in the Salt Lake area at Honolulu. Especially is it true that Exhibit A could not possibly be considered as identifying the particular property listed in the complaint and which is there described in such detail. The exhibit as a whole is not a sufficient *memorandum of the contract signed by the party to be charged*, embodying with certainty all the necessary terms of the contract.

Exhibit B is certainly insufficient as an *acceptance*, even if Exhibit A was an *offer*, which it was not. Exhibit B is *conditional* and imports new terms not suggested or implied by Exhibit A. Therefore, even applying the "fundamental judicial principles," it is not *possible* to make a contract out of the transaction between appellant and respondent in this case.

We respectfully submit that the judgment should be reversed.

Respectfully submitted,

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